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SPEECH

Lincoln Room

OF

HON. JAMES H. BIRCH,

OF MISSOURI,

IN THE HOUSE OF REPRESENTATIVES, JANUARY 8, 1868.

The House having under consideration the report of the Committee of Elections in the contested-election case from the sixth congressional district of Missouri—

Mr. BIRCH (contestant) spoke as follows:

Mr. SPEAKER: I will proceed, under the courtesy which has been extended to me by the House, to address myself at once to the great questions that are involved in the report that has been made by the Committee of Elections in this case; and as I shall not put it upon the ground first remarked upon by the distinguished author of the report, but upon the broader general grounds upon which he concluded his remarks, I will not even pause to correct mistakes, unintentional, of course, in the report of the committee. I will only say that if reference had been made to page 24 of the testimony it would have been seen that I ought to have had counted, of accepted votes, 108 more, increasing my majority 106 votes in the county of the contestee himself; and that by referring to pages 26 and 48 it would have been seen that the majority of the contestee should have been similarly reduced by counting for me, on the accepted vote of Clay county, a majority of 29 in Liberty township. It is repeated, however, that I will consume none of the time to which I am restricted in such *details* of wrong doing, intending to base my claim upon the broader grounds to which the fair-minded author of the report alluded toward the conclusion of his remarks.

I make no apology for appearing thus a second time a contestant at your bar instead of a member of your House. I made none four years ago, when coming here upon a record that was never finally acted upon, but which upon various preliminary motions propitiated for it a recognition and support not limited to the party with which I then acted and yet act; and as the record upon which I am permitted to speak to-day involves not only the same great principles, but is a far stronger one, I have, of course, no fear but that you will again "hear me for my cause."

It is the cause, sir, of an upright, a noble, and an outraged constituency; and in respectful recognition of the discriminating intelligence upon which alone I can hope for a discriminating adjudication of their controversy, the reading of such depositions as have relation to the educational antecedents of the thousands who did not attempt either to register or to vote in the election here in contest—and who are hence parties to it in its constitutional sense alone—will constitute my first duty. Many of these were citizens of the first consideration and intelligence; the rest, in the language of the testimony, "good average people," who either acted upon the mistaken theories of their political education in going into arms against the Federal authority, or by furnishing such "aid and comfort" to its adversaries as was treasonable upon my political theories, but the exact reverse upon theirs. Desiring merely that this large class of non-registering and non-voting citizens may not be improperly confounded, on the one hand, with the totally different class who *did* register and vote, either as accepted or rejected voters; and, on the other hand, that their past and present conduct may be appreciated in the light of official history, I will read first from the deposition of James M. Riley, who testifies, mainly, as to the effect of certain military orders, of which he was an official administrator, and which we will come to by and by, and then proceeds on page 52, as follows:

"I have been further requested, in this connection, to verify from the printed journal of the House of Representatives, of the 16th of May, 1861, the preamble and resolutions which were unanimously adopted and sent forth by that body, for the purpose of inciting the people to take up arms under the then Governor of this State, in opposition to the Government of the United States. They are recorded on pages 73 and 74 of said journal, and are as follows, to wit:

"'Whereas we have learned with astonishment and indignation that troops in the service of the Federal Government have surrounded and taken prisoners of war the encampment of State militia lately assembled near the city of St. Louis, in pursuance of law and by command of the Governor, for the purpose alone of military instruction; and whereas the United States troops aforesaid, assisted by a mob armed under Federal authority, have also murdered with unparalleled atrocity defenseless men, women, and children, citizens of Missouri, lawfully and peacefully assembled: Now, therefore,

"'*Resolved by the House of Representatives*, (the Senate concurring therein,) That we, the representatives of the people of Missouri, in General Assembly convened, do hereby protest to the civilized world, and especially our sister States, against this illegal, unchristian, and inhuman violation of our rights by the capture of our militia, assembled under the Constitution of the United States and the constitution of this State, and the murder of our defenseless people.

"'*Resolved* 2. That while Missouri has been loyal to the Government, struggling for its reconstruction, and is now sincerely desirous of an honorable adjustment of existing difficulties, she has received as reward for her fidelity, from persons assuming to act under Federal authority, unparalleled insults and wrong. An armed despotism, under infuriated partisan leaders, has been inaugurated in our midst, controlled by no law but passion, and actuated by the deepest hate against the people of Missouri and their institutions. Our railroads are now under military occupation. The steamboat C. E. Hillman, engaged in transporting goods from the city of St. Louis to the city of Nashville, has been seized by Government troops within the jurisdiction of this State and the cargo taken out. The capital of the State is openly threatened with capture, and our session is now being held in the midst of armed citizens hastily assembled for defense.

"'*Resolved* 3. That it is the unquestioned constitutional right of the State to arm, equip, and organize her militia for defense against aggression from any quarter, and the attempt of Captain Lyon, acting, as he says, under authority from Washington, to use the exercise of this right as an excuse for his conduct, evinces but too clearly a disposition upon the part of the authorities at Washington to disregard and trample upon the sacred rights of the people of Missouri.

"'*Resolved* 4. That the charge of Captain Lyon, in his letter to General Frost, that the proceedings of the State authorities, or of this General Assembly, at any time, furnished a pretext for the course pursued by him is entirely gratuitous and false.

"*Resolved* 5. That the Governor of this State is hereby directed to make demand of the President of the United States whether these outrages have been authorized by the Government, and for the immediate return of the arms, camp equipage, and other property belonging to this State, lately taken from our military near St. Louis, and for the unconditional release of our State troops.

"'*Resolved* 6. That the Governor is also requested to take instant action by calling forth the militia of the State for the purpose of defense, and that the people of Missouri should rally as one man to perish, if necessary, in defending their constitutional rights.

"'*Resolved* 7. That the Governor be requested to furnish a copy of the foregoing preamble and resolutions to the President of the United States and to the Governor of each of the States.'

"As already stated, these resolutions were adopted without a dissenting voice of the members present, among whom was the then representative from this county, a Union man, (since and now a Radical,) but acting then upon the political incentives and social sympathies which were almost unanimous in this section of the State, and which were but naturally responded to by great numbers in going into arms for what was thus officially and unanimously represented to them as the defense of their 'constitutional rights.' Of the men who obeyed this and similar incitations by going into arms, or otherwise giving 'aid and comfort to the enemy,' I am not aware of any that applied to register or vote at the last election. My recollection is that they were specifically dissuaded from doing so, not only in the published addresses of the Conservative State committee, but by the speakers and candidates of the Conservative party; and if there was cast at the last election in this county, either on the accepted or rejected list, a vote that should have been rejected for disloyalty, either my own views of loyalty are erroneous or the name has not been mentioned in my presence."

I have read, Mr. Speaker, and hold in my hand the official journal to verify, if need were, this exemplification of the unanimous official incitation of the House of Representatives of my State—of which thousands of copies were ordered to be printed and circulated among the people, and which I had everywhere to confront when addressing them in opposition to theories thus speciously indorsed and promulgated. It is, perhaps, pardonable to add, sir, that it was no holiday service, but that, on the contrary, I met with many who had been accustomed to listen to me with consideration and courtesy upon previous political issues, who seemed quite earnestly impressed that I ought *not* to be listened to in opposition (as it was argued) to the unanimous legislative incitation of my State. It will suffice to add that great numbers went into arms openly, in opposition to all that could be essayed to the contrary by those who had at the time no sufficient coöperation to prevent it. Of many "thousands" of these, their excuse and their story is so well related by one of their number as to render it proper to read it, and to close thereby the preliminary branch of the case with which I have been intrusted.

At page 54 Anthony W. Palmer deposes and swears as follows:

"I am a citizen of Clinton county, Missouri, and have been for the last thirty years. I was educated in the political theory that State intervention, by State authority, would be permissible and justifiable as against unconstitutional Federal aggression; and that in case of ultimate collision or conflict the State would be entitled to the primary allegiance of its citizens.

"In the spring of the year of 1861 the General Assembly of this State passed a law to provide for organizing, arming, and calling out its militia in anticipation of such a conflict: and as it was explicit and peremptory in its provisions, I entered and continued in its service until the State convention of the same year abrogated the said law, and proclaimed an amnesty in favor of all who would renounce or abandon further service under it.

"On the 8th of December, 1861, which was before the expiration of the period to which the acceptance of that amnesty was limited, I did so renounce and abandon that service, not only by taking the oath which was required of me, but by subsequently and properly reporting myself in person to Colonel James H. Birch, jr., who was the aid-de-camp of Provisional Governor Gamble, for this military division of the State.

"As the terms of the voters' oath which was subsequently prescribed by the same convention were not retrospective beyond the period to which the acceptance of that amnesty was limited, (sixty days, expiring on the 17th December, 1861,) I continued of course to be entitled to vote, and voted accordingly, until a subsequent convention, which assembled in the year 1865, divested me of the right, by incorporating in the new constitution an oath which is not only retrospective as to the whole period of the rebellion, but which included also all who had *ever* sympathized with persons engaged in it.

"As I could not honorably or conscientiously take such an oath as that, I have not asserted my right to vote, even against the adoption of the new constitution, which I feel so unjustly disfranchises me; and this, notwithstanding others, upon whose concurrence and advice I acted in obeying the call of the State authorities in 1861, have been permitted to register and to vote in opposition to my views and those of the conservative Union party with whom I would have but naturally acted. Of these, the supervisor of registration in this county, and its former representative in the Legislature, may be mentioned as among its most prominent examples, and as examples only. The former is proven, upon his own admissions and otherwise, to have similarly sympathized with the southern people, and to have advised others to go into the State service (against the Federal authorities) just as I did: and the latter not only voted for the military bill under which Price's army was organized, but also voted (unanimously with the house of which he was a member) that it was the *duty* of the people of the State to do as so many of us did in defense of what we were thus taught to believe were our 'constitutional rights.' Of course I complain of this in no other sense than that the registry law has been so unjustly administered as to permit those who thus incited us to go forward in what they officially declared to be our duty in 1861 to register and to vote for our disfranchisement, for no other reason than that we acted in concurrence with their advice and their *law*, so long as it was a law."

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"I have since that period been attending to my ordinary pursuits as a farmer—not, of course, indifferent to the course of public affairs—and have no doubt that what is thus written of myself is substantially true of thousands who were with me in the 'State guard,' under the State law of 1861, but who declined, as I did, to go into the confederate service (although strongly pressed to do so) after the abrogation of that law and the proffer of the just and generous amnesty already alluded to."

It may seem superfluous to add, Mr. Speaker, that these and every additional deposition I shall read were taken under the eye and the ear of the counsel for the contestee; and that it is intended in thus giving them to the ear of the House, and afterward to its congressional history, (or Globe,) to at least suggest and establish for a class of citizens who were politically educated and officially incited to do just as they did, a more charitable and statesman-like appreciation of their motives and conduct than may have been suggested by the interested partisanry which is content to carry its point, no matter how. To this, however, it is my duty to add a repetition of the reliance, that whatever may be thought of the motives or the reasoning of the "thousands" thus alluded to, and who the testimony will disclose did not even attempt to register or to vote, *their* status should be in no sense confounded, either in the argument or decision I am respectfully addressing myself to at this point and in this connection, with the *ever* loyal citizenry who *did* vote, and upon whose votes I solely relied when claiming before your committee that it was my right to come in, and sit, and act amongst you here.

The case involves, however, another point or purpose which may appropriately enough be considered in the same connection, which is, that citizens thus forgiven and amnestied by the convention of 1861 were of course voters upon the question of calling the subsequent one in 1864; and as I expect to deduce from the authorities, (*including that of the committee itself*,) and to demonstrate by argument, that a convention which derived its sole authority from the vote of *such* a political "people," (namely, all who could and would take the prospective oath of loyalty, as ordained by the first convention,) could in no respect transcend that authority, and least of all by disfranchising its own constituency, without at least a subsequent ratification by that constituency, it is respectfully trusted that this deposition and the one I will next read may at least be regarded as pertinent to the governing guide of registerial *construction*, upon which it will be presently insisted that the right to the seat in contest (or at least its vacation) should be made to turn.

I will hence read another deposition, at page 55, as demonstrating that it was not merely such misguided and forgiven citizens as Palmer and other "thousands" were with whom the political contrivers and authors of this new oath repudiated the most solemn faith of their State, but also such ever peaceful and loyal citizens as Joseph B. Biggerstaff, who could and *did* take the oath, but who was imperiously and successfully "construed" out of his vote, as will appear from his deposition, as follows:

"I reside in Plattsburg, Clinton country, Missouri, and have so resided, with the exception of a year or so I resided on my farm, (in the same county,) for the last twenty-four years. I was one of more than a hundred and fifty citizens who desired and applied to take the oath of loyalty, and to cast our votes in opposition to the ratification of the new constitution at the election which was held for that purpose at Plattsburg and throughout the State on the 6th day of June, 1865.

"Being refused permission to do this by the election judges, on the ground that our names appeared, with others, upon a list or enrollment that had been made by certain military officers during the latter part of the year 1862, as 'southern sympathizers,' we complained of it in a respectful written protest, which was simultaneously prepared and forwarded to the Governor, in consequence of which the material facts of the case remain more distinctly impressed upon my memory than they otherwise might have done.

"I was personally acquainted with many of the persons thus rejected as voters. They were orderly and upright citizens, several of whom had been rejected as militiamen when the companies came to be reorganized under 'Order No. 24,' but I had no reason to believe that they had done anything which disentitled them to take the prescribed oath and to vote as they had always done, unless that oath was to be construed (as it then was and has since been) to mean that the decision of these military classifiers was final, and that the sympathies which many of us but naturally entertained for a kindred southern people should disentitle us to a vote, under a Government to the laws and requirements of which we had always loyally conformed ourselves, and especially (as was then the case) upon the question of our own permanent disfranchisement. Such an assumption I knew to be the reverse of either truth or justice in respect to my own loyalty, and I had no reason to believe it was less unjust and untrue with respect to others who were similarly refused the right to vote at that election, or since, in which it appears that only about half the citizens of the county or the State were permitted to participate."

While the manner in which the committee have condensed and stated the propositions I argued before them is sufficiently lawyer-like and fair, it is nevertheless proper to be suggested, that in deference to the judgment of those who thought my object could be as well or better attained by simply relying upon the terms of the enabling act of the convention to fix and limit the *construction* of their ambiguous and unratified "oath," it was dwelt upon in my "brief," as it will be in this connection, mainly with that view. It matters not, of course, that upon the general proposition of the absolute nullity of the so-called new constitution, *as* a constitution, the opinion that is so common with the more eminent of my professional contemporaries and friends continues to be my own opinion, and that in another connection, and for a purpose more all-embracing, I may at least condense the reasons for that opinion. Until then it will suffice to add that the argument of my "brief," upon which "the committee did not deem itself at liberty to enter," will be substantially my argument in this connection.

In that "brief," Mr. Speaker, I quoted from the law of my State entitled "An act to provide for calling a State convention"—the organic or enabling act, as it will be called through the course of this argument—its fifth section, as follows:

"SEC. 5. The delegates elected under the provisions of this act shall assemble in St. Louis on the

6th day of January, 1865, and organize themselves into a convention by the election of a president and other officers, as they may deem necessary, and shall proceed to consider, first, such amendments to the constitution of the State as may be by them deemed necessary for the emancipation of slaves; second, such amendments to the constitution of the State as may be by them deemed necessary to preserve in purity the elective franchise to loyal citizens, and such other amendments as may be by them deemed essential to the promotion of the public good."

At the date of this enactment the elective franchise in that State was regulated by a constitutional provision which granted the ballot to all white males of the requisite age and citizenship, and by the oath contained in an ordinance of a previous State convention, adopted on the 10th day of June, 1862, in these words:

"I, A B, do solemnly swear (or affirm, as the case may be) that I will support, protect, and defend the Constitution of the United States and the constitution of the State of Missouri against all enemies and opposers, whether domestic or foreign; that I will bear true faith, loyalty, and allegiance to the United States, and will not, directly or indirectly, give aid and comfort or countenance to the enemies or opposers thereof, or of the provisional government of the State of Missouri, any ordinance, law, or resolution of any State convention or Legislature, or of any order or organization, secret or otherwise, to the contrary notwithstanding; and that I do this with a full and honest determination, pledge, and purpose faithfully to keep and perform the same without any mental reservation or evasion whatever. And I do further solemnly swear (or affirm) that I have not, since the 17th day of December, A. D. 1861, willfully taken up arms or levied war against the United States or against the provisional government of the State of Missouri: so help me God."

As rendering intelligible the reason for designating the prospective period and operation to which this oath was restricted, it is deemed sufficient to recur to the depositions of Riley and Palmer, which were read at the opening of this argument, and to add that by other provisions of this law the calling and holding of said convention were made to depend upon a vote of the people of the State—the ninth and tenth sections of the organic act, from which section five has been already quoted, being in these words:

"SEC. 9. All persons qualified to vote for members of the General Assembly, under existing laws and ordinances, shall be entitled to vote for delegates to said convention.

"SEC. 10. At the times and places of voting aforesaid the qualified voters of said State shall be permitted to vote 'for a State convention' or 'against a State convention,' and the votes so cast shall be returned to the secretary of State, with the returns for delegates to the convention; and if a majority so voting shall have voted 'for a convention' the convention shall assemble and proceed to the discharge of the duties assigned to that body under this act," &c.

It is admitted that the majority of those "so voting" was "for a convention;" that such a convention assembled, as it was authorized to do, in the city of St. Louis, on the 6th day of January, 1865, and proceeded, as is shown by its journal, to ordain an entire "new constitution," which shows upon its face that it was *not to be* submitted for ratification to the constituency or "people" who had authorized its election and assemblage for the purposes specified in the organic act, (and without whose ratification it is respectfully submitted they could not be divested of any right to which they had not contingently assented by their vote, which only authorized a convention to be elected for the specific purposes enumerated in the said organic act,) but to a *new* constituency or "people," as set forth in the new oath, (here in contest,) which, by the terms of said new constitution, was to be required of all persons voting upon it.

UNFAIRNESS OF THE REGISTRATION.

By one of the clauses of this new oath every applicant for registration as a voter has to swear that he has never, "with a view to avoid enrollment in the militia of this State, or to escape the performance of duty therein, or for any other purpose, enrolled himself or authorized himself to be enrolled by or before any officer as disloyal or as a southern sympathizer, or in any other terms indicating his disaffection to the Government of the United States in its contest with rebellion." To this it may appropriately be added in this connection, (subject to the testimony to be presently referred to,) that loyal men who readily took this oath were nevertheless rejected as voters upon a simple inspection of the military enrollments of 1862, which are proven to have been made up, "as a general rule," upon principles alike at variance with justice and with true "loyalty," by an officer who had "no discretion in the matter;" and that "every man, who had at *any* time sympathized with the people in rebellion," (as they had all been taught to do,) or "whose sympathies were" even "*regarded* as being with the South," was entered on the so-called disloyal list, although protesting his loyalty to the Government of the United States." Respectfully repeating the hope that these fundamental official facts may not even inadvertently be lost sight of by the House, my next reference will be to a previous portion of the deposition of Colonel Riley, to be followed with that of Captain Ferguson, as to the class or status of the men who were *forced* upon this "so-called disloyal list," and which was not only made the basis of the registerial enrollment in the election here in controversy, but against the showing of which, it may as well here be quoted from the testimony, the registering officers "would hear *no* testimony."

At pages 51 and 52 Colonel Riley testifies as follows:

"I have resided in the town of Plattsburg, Missouri, from my infancy, and am in my twenty-ninth year of age. I am a lawyer by profession, and having been variously connected with the State military service during the late rebellion, I have been requested to condense the import and effect of the various military orders for the enrollment of the State militia, including the political consequences as resulting from what is termed the oath of loyalty in the new constitution.

"The first general order for an enrollment of the State militia was numbered 19, and was issued on the 21st of July, 1862. It recited the necessity for such enrollment and organization, with a view to arrest and prevent robberies, murders, and lawlessness of bushwhackers and other marauders; and as it made no distinction between citizens of different political sympathies, a public meeting was immediately called and held in the court-house, at which it was resolved without dissent, upon the motion of Judge Birch, that the call for said enrollment would

be promptly responded to by all the men of this county subject to military duty. Within a few days a large company, comprising citizens of all shades of political opinion, formed into a company and completed their organization by electing officers alike diverse in their opinions or political sympathies, and the work appeared to be similarly proceeding in other parts of the county, when a subsequent order, dated on the 28th of July, and numbered twenty-three, left it at the option of persons who preferred to contribute money rather than personal service in the militia, to do so. There were many who preferred to pay the exemption fee, which was fixed at ten dollars, and was to be used as a fund for defraying the expense of the militia who were called into active service. Some did thus obtain exemption, and others were preparing to do so, when an entire new turn was given to the whole matter of military enrollment and organization by the appearance of Order No. 24. This order, which was issued on the 4th of August, 1862, revoked Order No. 23, and directed an enrollment to be made of "all the loyal who were subject to military duty," for military purposes, and that "all disloyal men and those who had at any time sympathized with the rebellion" should be separately enrolled on another list, and not "permitted to do duty in the Missouri militia." In consequence of this last order, together with the others, the town company that had completed its organization, and others that were in process of organization in other parts of the county, had to be broken up or modified, inasmuch as those of them who were regarded as of southern feelings or sympathies were not permitted to enter the military service in the said militia.

"I was myself an enrolling officer, and also an officer in one of the companies that was organized and went into active service under Order No. 24. And it is hence within my personal as well as my official knowledge that the militia thus actively engaged had to be supplied with horses; and such as were needed by the men who had none were taken from the men who were not permitted to enroll with us for active service—such being the result of the order under which we went into active service.

"It is within my knowledge that many who were thus refused, or not permitted to enroll in the militia, and who were consequently enrolled on what was called the sympathizing or disloyal list, were rejected as voters during the period of last year's registration, and for no other reason that I am aware of than that their names were found upon the list aforesaid. Quite a number of these I have a sufficiently intimate acquaintance with to form the opinion that they were as loyal citizens as I am myself admitted to have been. They so far differed with me in respect to what came to be termed their sympathies, or in the expression of them, as to be refused permission to act as militiamen; but I regarded such sympathies, with persons of their nativity or associations, as being but natural and not at all disloyal."

Deferentially relying that, with the patient attention of the House, it will find me making the necessary legal connections at the proper time, I will next read from the testimony of Captain Ferguson, in corroboration of that of Colonel Riley, as follows:

"I have read that portion of the deposition of Colonel Riley (this day given in the contested-election case of Birch *vs.* Van Horn) which relates to the enrollment and organization of what he styles the Plattsburg company, under General Order No. 19, and concur in the general correctness of his statements. I was elected captain of said company and marched with it (under orders) to Cameron, a distance of eighteen or twenty miles, to join with others in pursuit of the rebel Colonel Poindexter; but when we reached Cameron, it was found that there was enough without us, and we were permitted to return home. A few days after this Order No. 24 was issued and promulgated, and as my command contained quite a number of men whose sympathies, as they were termed, were supposed to be southern, it had to be broken up or modified, as stated by Colonel Riley.

"I was also present at Cameron a few days afterward, when a company similarly organized, under the command of Captain (afterward Colonel) Parrott, was dissolved, or rather some fifteen or sixteen men were dismissed from it on account of their alleged sympathies. I was not regarded as having such sympathies, became subsequently the assessor and sheriff of the county, and have always been allowed my vote."

May it not be appropriately suggested at this point, that by recurring to the testimony of Riley as to the similar breaking up of other companies that were in process of organization in other parts of the county, and by accepting the statement of Ferguson as to the number of *fighting* "sympathizers" who were thus driven from his company, and that of Captain Parrott, as the probable average of the district, the aggregate will be found to so nearly correspond with the aggregate of the rejected votes which were so conscientiously sworn into the ballot-boxes for me, as to justify the conclusion that, under the "general rule" which is recited by the enrolling officers, the men who had armed and marched and bivouacked in pursuit of Poindexter, were to that extent schemingly and cruelly *driven* from the defense of your standards and transferred to the "so-called disloyal list of southern sympathizers?"

How came all this to pass, Mr. Speaker? The testimony of Viglini, at page 8, forecasts alike the process and the wrong, as follows:

"*Question.* What office did you hold during the late rebellion, and what duties did you perform under General Schofield's Order No. 24?

"*Answer.* I was one of the justices of the county court of Clinton county, and was provost marshal of said county. In connection with the latter office I had the duty assigned me by Lieutenant Colonel Swearingen of enrolling the citizens of said county on what was called the loyal and disloyal lists. On the loyal list it was my duty to enroll for military purposes all male citizens between eighteen and forty-five years of age; and on the so-called *disloyal* list it was my duty to enroll all citizens of whatsoever age who had *at any time sympathized with the people in rebellion.* I had no *discretion* in the matter, nor had the people. The enrollment of the county was made, therefore, as directed by General Schofield's Order No. 24 and the explanatory circular of Brigadier General Hall, dated September 25, 1862. The total number enrolled on the so-called disloyal list was over six hundred. In the enrollment of the county, *as a general rule, every man* whose sympathies were regarded as being with the South was entered on the so-called disloyal list, *although protesting his loyalty to the Government of the United States.*"

The next revelation—may it please the House—the next revelation in the history of this forecasting and deliberate political injustice will but naturally be to demonstrate from the testimony, that the contemned and outraged "loyalty" which had been thus enrolled as disloyal *despite* its submission to the ordeal of rebel fire, was, with equal heartlessness, under a like systematic and inexorable "instruction" or "*rule*" refused registration upon the list of "accepted" voters, and had to register and to vote as "rejected" voters; and that your whole practical duty will consist in deciding whether such a registration was just or *unjust*, legal or *illegal*, right or WRONG.

The first testimony I will read upon this point will be that of Harvey Springer, a friend and supporter of the contestee, (as every registering officer of the district was supposed to be,) but one of the few who was not himself a candidate on the same ticket with him, and who had hence no personal reason to either shirk

my subpœna or evade my questions—and it is but just to add too upright a man to have done so—and who hence appeared and swore as follows:

"*Question.* Were you appointed by the supervisor of registration for this county register for this (Concord) township?

"*Answer.* I was.

"*Question.* Did the supervisor furnish you with a list of names said to be of men who were said to be enrolled as disloyal under General Schofield's Order No. 24 as disloyal persons? If so, what were the supervisor's instructions, and what were your actions when said persons came to be registered?

"*Answer.* The supervisor furnished me a list certified by him to be a copy of the sympathizing list of this county, with instructions that all such persons when they applied for registration should be put on the rejected list, and which was accordingly done.

"*Question.* Were not the most of the men you rejected as voters on that list?

"*Answer.* All the men rejected by me except four were on that list, and were rejected for that reason.

"*Question.* Did every person who was put on the rejected list by you take the oath of loyalty presented by the new constitution?

"*Answer.* Every one was required to take the said oath of loyalty before he was even put on the rejected list."

There is a cross-examination of this witness, as of several others, which but confirms my judgment of the forecasting injustice of the registerial construction which is in issue here—a construction which was carried into a general instruction, and which practically and peremptorily forbade the right of loyal or accepted registry to even the sympathizing *soldiery* of the district, whose obedience to the call of the loyal general, now a member of this House, [Mr. LOAN,] when marshaling a force to *drive from* the country a daring and popular rebel leader, need not be further dwelt upon. That such men were *not* disloyal; that on the contrary their sympathies, as has been so well sworn to by one of the mustering officers, were "but natural to persons of their nativity and associations;" and that having from first to last repressed or subordinated these natural sympathies to the sterner behests of loyal *duty*—just as I may be pardoned for adding my own were, and yet are, repressed—the registerial "rule" under which they were so schemingly and so cruelly ostracized, and which will be more patiently examined by and by, was so calculatingly, so deliberately, and so *atrociously* unjust, as of itself to constitute palpable and sufficient grounds to at least *set aside* an election which was held under such a registration.

But I have not yet done with the testimony of the friends of the contestee as to this deliberately concerted and deliberately executed malregistration. By the testimony of Hunt, at pages 12 and 13, it will be seen that he was a member of the convention which nominated the contestee, and that he was compelled to swear, in answer to the searching question of my attorney, that the members of that convention (at which the contestee was present) "expressed themselves that only in the *rigid* enforcement of that law could Judge Birch be beaten," and that "such were the *views and purposes* of that convention." No wonder, Mr. Speaker, that a lawyer as astute and forecasting as the cross-examining attorney for the contestee is conceded to have been should object (as he did, page 13) to the answering of the question which drew out such an answer, combined with such an admission. He, too, was a representative friend and supporter of the contestee, and was of course professionally aware that such an answer as Hunt or any other honest member of the nominating convention would be compelled to make to such a question, would establish the general concurrence that the success of the sitting member could only be achieved against me by exactly *reversing* the unshaken judicial rule for construing statutes of the nature of the Missouri registration law; and that to thus show that such was the mutual and concurrent "purpose" with which the supporters of the contestee returned from their convention, would but naturally explain and illustrate, to the degree of indignant and *general* vitiation, a registration which was as illegal in "purpose" as it was utterly shameless in practice.

Without feeling it permissible in this connection to direct your attention to the depositions from other counties, as to what I was prevented from proving by the "*sustained*" objections of the contestee's attorney, I but refer, at page 17, to the deposition of Bassett, another of his leading supporters in my own county, as corroborating that of his conventional one, and will no longer restrain myself from the *legal* "connection" sometime since alluded to, and which will be a substantial *resumé* of the "brief" from which I have so long, but I trust rather illustratively, digressed.

ILLEGAL CONSTRUCTION OF THE OATH SO AS TO REJECT MEN WHOSE CONDUCT WAS "NOT EVEN BLAMEWORTHY."

That the oath in contest here, especially in the official *construction* which was everywhere given to it by the officers of registration, was more restrictive of the elective franchise than was authorized by the organic or enabling act of the Legislature, which was simply to "proceed to the duties assigned to them under that act," or, in other words, as to the question here, to "consider of such amendments to the constitution of the State as may be by them deemed necessary" "to preserve in purity the elective franchise to loyal citizens," will be *judicially* apparent by reference to the second paragraph of the opinion and decision which was rendered by the Supreme Court of the United States at its last term, wherein John A. Cummings was plaintiff in error and the State of Missouri defendant in error, namely:

"The oath prescribed by the constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts against which it is directed constitute offenses of the highest grade, to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offenses in the laws of any State, and some of the acts, under many circumstances, would not be even blameworthy."

May it not be unhesitatingly submitted that a convention which had no authority conferred upon it in respect to the elective franchise, except, at the farthest, such a restriction of it as should preserve it "in purity to loyal citizens," was but necessarily *without* authority

to disfranchise a class of men which all the testimony has shown, and will continue to show, were themselves "loyal citizens," and whose alleged "sympathies" or "acts," it has been seen, and will continue to be shown by the testimony, were "not even blameworthy?" And could such a construction as was given to the clauses of the oath in contest by the registering officers of the district, who are proven to have been the friends and supporters of the contestee, have been in any respect legalized by an election in which those citizens were not allowed to participate? Or, if legalized at all, as it may be argued it should be, for the sake of the public tranquillity, may it not be additionally and *undoubtingly* submitted, that the only permissible construction of "the said oath" is fixed, not merely by an unvarying current of judicial decisions, which lean to the side of the "people" who were voters on one day and menaced with disfranchisement the next day, but by the unyielding terms of the fifth section of the organic act itself; and that *no* construction was permissible which transcended the object or purpose to which (in this respect) the convention was restricted, namely, "such amendments to the constitution of the State as may be by them deemed necessary" "to preserve in purity the elective franchise to loyal citizens?"

Who *were* "loyal citizens," who "the people," at the date and by the recognition of that organic act? Were those who had mistaken their "paramount allegiance," as Palmer and "thousands of others" did, but who condoned their error and placed themselves in *true* allegiance, under the ordinance and the amnesty (State and Federal) of 1862, any less entitled to voting citizenship than other citizens were? And having been recognized as citizens and voters by the organic act upon which they were called to vote in 1864, and which was to give to the convention, if called, all the authority it would possess in respect to the elective franchise, could such citizens and voters *be* disfranchised, as the contestee assumes they *have* been, unless they were outvoted at an election in which they, too, were allowed to participate? It would seem that where the very gist of their complaint is that they gave the convention no authority to disfranchise them, without at least a proper subsequent ratification, all such questions as the foregoing must be *necessarily* answered in the negative; and that if so, it at least decides and enstamps the "construction" which the oath in question should have received, instead of the exact reverse, to which probably every page of the record bears testimony that it was misused and perverted.

Had these supervisors and registers the *right*, or was it legal and *right in them*, to disregard this fundamental guide to a just and proper construction of this purposely ambiguous "oath," and to so contemn and disregard the organic limitation which was imposed upon the convention itself, as to absolutely *exclude* from registration, as "accepted" voters, the "loyal citizens" whom the record shows to have been obedient to every legal requisition, including prompt and faithful military duty, until they were schemingly and cruelly *driven* from that service by the construction which was placed upon a new military order (No. 24), for "sympathies" which seem always to have been subordinate to their "loyalty," and which, in the language again quoted from the court of last resort, "were not even blameworthy?" That these partisan registers—many of them candidates on the same ticket with the contestee—did give to the constitutional and concurring (?) legislative enactment upon this point a latitude of construction which not only transcended but practically *defeated* the limitation to which the organic act (and the people in voting for it) restricted the convention, has been proven by the testimony of Register Springer, (as to the so-called sympathizing lists which were made by the military authorities in 1862, and by which the registering officers were instructed to be governed,) and by the concurring testimony of Viglini, Riley, Biggerstaff, and Ferguson, already referred to, in Clinton, and of Hale, Brand, and others in the counties of Carroll, Saline, Platte, and Clay—pages 30, 31, 40, 43, and 45. By this testimony it will be seen that the mere fact of having been enrolled on the "sympathizing list" of 1862 by the military subordinate for the time being—whether with, without, or even *against* the consent of the citizen—was to be, and was, regarded as "conclusive evidence" upon the point of his disloyalty; and that neither the registering officer nor the board of appeals, which consisted of the instructing supervisor and the thus instructed registers alone, "would hear any testimony in opposition to it."

Were, then, the 2,825 voters, which are proven to have been either registered and polled for the contestant as "rejected" voters, or rejected from his poll of "accepted" voters by the county canvassers of Clinton, Clay, and Jackson, legally or illegally rejected—at least in the proportion established by Register Springer, and which it is but fair to assume as the proportion throughout the district? Referring again to the testimony of the military enrolling officers, and to the answer which had to be everywhere made to "question 29," (page 19;) referring also to the testimony, which but repeats the law, that every citizen whose name and vote stand thus recorded as "rejected" had taken and subscribed the so-called "oath of loyalty" in full; and that if falsely taking it they subjected themselves almost inevitably to prosecutions for perjury before courts and juries from whom they could at least expect no *political* favor as against the partisan registers who had rejected them; and that, notwithstanding the sixty days' additional time which was allowed to the contestee, in which to take rebutting and other testimony in this case, he has placed nothing upon the record to denote that even an *indictment* had been found against either of these supporters of the contestant for having sworn falsely, throughout the district, in order to get in a majority, upon my count, of 2,236 in my favor—if of this vast number of rejected

voters, whose status is written down as that of "loyal men" in the uncontradicted and even unrebutted record they have had presented for your consideration—if with this, and the systematic and all-pervading unfairness and fraud which the testimony establishes against the registration and other official acts of the friends and supporters of the contestee, from its opening page to its concluding paragraph, it may not be presumptively computed and concurred in, that at least enough of them to have elected the contestant were *not* "disloyal" in the sense of the organic construction to which this oath must necessarily be subordinate—*if this may not be so*, the contestant must needs submit to have his judgment corrected by the majority of the House, in the view he has thus alone insisted upon as entitling him to the seat in controversy.

THE REGISTERING OFFICERS THEMSELVES THE MEN WHO COULD LEAST TRUTHFULLY TAKE THE OATH.

Looking a little further into the record, as the only permissible basis for the argument or the final disposition of this case, it will be seen, at page 13, that George Funkhouser swears that he had been sheriff for two years preceding the election, the latter part of the time being necessarily under the appointment of Governor Fletcher, and hence removing even a suspicion as to his loyalty; that he had previously, for a number of years, been sheriff and deputy sheriff, and was hence well acquainted with the people of the county, including those whose votes had been rejected under the new constitution, and that he did *not* regard the sympathies of those with whom he was thus "well acquainted" as amounting to disloyalty to the Government of the United States, but that, on the contrary, they were peaceable, law-abiding and *law-sustaining* citizens, claiming to be loyal notwithstanding their sympathies.

In answer to the question which was constructed (*in hæc verba*) upon the specific charge that was made against a portion of my supporters, in this county and elsewhere, in the closing paragraph of the answer of the contestee, he swears specifically that he does not "know or believe that any person of known disloyalty, who had been in arms against the United States or the State of Missouri, or who had given aid and comfort to the enemies of the United States or the State of Missouri, or any outlaw, guerrilla, bushwhacker, or other disloyal person, disqualified under the laws of the State, was permitted to vote in the election here in contest." Viglini, the old provost marshal and enrolling officer, answers this question as Funkhouser did, except as to the county supervisor of registration, and he, it is proven, was elected sheriff on the same ticket with the *contestee*—and substantially the same is sworn to in other counties. Johnson swears that he had resided in the county for upward of twenty years, had been twice a judge of the county court, was generally acquainted with the people; and having replied to the charge of the contestee, just as the old sheriff did, answers further and still more specifically, under the cross-examination of the counsel for the contestee, that he does "not know of any man voting on the rejected list who was disloyal within the meaning of the terms of the new constitution."

And yet the contestee neither condescends or ventures to take any testimony, either to sustain the charge upon which it was perhaps mistakenly relied to bluff or badger the Representative of the people thus provenly calumniated, or to attempt to even *modify* the record upon which I appeal for your verdict against the systematic and all-embracing injustice of a most shameless registration! May I not successfully submit to the House whether such a neglect to avail himself in this respect of the additional "sixty days" you gave him is curable or even *excusable* in the too charitable presumption of the committee as to what he *might* have done but did *not* do; or by such of his cross-examinations as prove that my *political* status does not accord with that of a majority of the tribunal before whom I have brought my case as judges, *not* as partisans.

I might quote still further corroborations of the effect of the systematic and well nigh *maddening* perversions of an oath which, whether purposely ambiguous or not, (so that its practical construction might be either plastic or stubborn, according to the interest and the "purpose" of the party who had it all in their own hands,) I have abundantly proven *was* misconstrued and misadministered. As denoted elsewhere I might still further enforce and amplify this position by reading and remarking upon the testimony of Lyons and Hughes, of Whittington and the Clays, in my own county, and upon that of Brand, Myers, Hale, Standley, Williams, Winfrey, Sandidge, Norton, Lewis, Wilson, Roberts, Fisher, O'Nan, Adkins, Moss, Hallisey, and Garner in other counties; but permit it to suffice, in recognition of your long-taxed patience, that as the testimony from my own county contains not even an *insinuation* to the disparagement of the practical loyalty of its rejected voters, and as we are tacitly trying this case on the testimony from that county alone—not so strong in some respects as the testimony from other counties, but conceded to be (as suggested by the committee) a fair or *average* "specimen of the evidence relied on"—we will pass at length to the *legal* propositions which I so deferentially, yet earnestly propose to contest with the committee.

That being perhaps the only contest between us in the view of the case *now* under consideration, it may be conceded to the erudite and distinguished author of the report that my less astute judgment might probably have concurred with his, had the case in controversy been necessarily determinable upon the technicalities of the books, instead of the satisfied conscience and judgment of the House. My convictions, however, are quite as earnest as his can be, that I have brought before you the consideration of a record from which your judgment ought to be satisfied that the election here in contest was *not* the "free and fair" one for which we have a constitutional guarantee—and upon which, indeed, depends whatever *else* is just, or free, or fair—and that it should not

therefore be recognized and upheld upon technicalities which I sought to avoid, but could not.

THE TECHNICAL QUESTION OF EVIDENCE.

The reasons assigned by the committee for not even vacating the seat in contest are set forth in the concluding paragraphs of their report as follows:

"If the class of evidence introduced by the contestant had been the only means within his reach to establish the right of the persons rejected to be registered and vote as qualified voters, there would be very plausible ground to claim that enough ought to be presumed from it to, at least vacate the election, unless what is proved by the contestant was rebutted by evidence from the other side. But the contestant was not confined to this proof, or evidence of this general nature at all. The provisions of the constitution and laws of Missouri furnished him peculiar facilities to establish his case, if he relied upon proving that legal voters were excluded from registration and voting as qualified voters, inasmuch as the rejected list of the registers and the rejected votes furnished the names of the persons and the candidates for whom they voted.

"Under these circumstances, the committee consider they have no right to rely upon such vague and general evidence as has been furnished, or to draw presumptions and conclusions from it, when it was clearly within the power of the contestant to have established the facts he asks us to presume by clear and exact proof, if such facts exist.

"The committee consider, also, that in order to unseat a member of this House who has the regular certificate of election, and who is conceded to have received a majority of several hundred votes of the votes received and counted, they should be able to report whose votes were excluded that ought to have been counted; that it would not do for the committee or for the House to say that out of twenty-five hundred rejected voters, all of whose names are unknown, they are satisfied that enough were legal voters and ought to have been counted to give the contestant a majority."

As I would fain escape even the *implication* of censure for having in any sense trifled with the patience of the House in having brought to its consideration a contest upon evidence less specific than it was reasonably in my power to obtain—and which, it may be added, I had precedent official reason to believe would be deemed sufficient to at least vacate this election—it is trusted I may be borne with a little longer whilst essaying to vindicate or excuse myself in this regard. Before doing this, however, it may be permissible to remark that I was aware, from the commencement, that if "the best evidence" in such a case was required of me, it would involve, first, the official comparison of the ballots with the corresponding numbers on the poll-books, and that then, after proving by exemplifications of the registry lists that the persons whose names were found to correspond with the numbers on the ballots which had been cast for me had been duly *registered*, to have proceeded to prove by competent parol testimony, after proper notice as to each individual, that each of them (or at least enough of them, one by one, to have changed the result of the election) had been illegally rejected as a voter.

As to the additional labor and expense of all this, of which the lawyers of the House will be the most competent to form a reasonable proximate estimate, they will doubtless concur with me that it ought not to be imposed upon a contestant unless *absolutely* necessary to the intelligent and upright decision of his contest—a contest which, in analogy to the laws of Missouri, should be proceeded with and decided "without the form of pleading." What with the foundation expenses of comparisons, copies and certificates at the clerks' offices, and the subsequent expenses of summoning and examining proper witnesses as to the loyalty of each particular name or person whose vote had been rejected despite his *own* solemn "oath of loyalty," a very moderate estimate of the mileage and attendance fees of witnesses, day after day, and of the additional lawyers who would have necessarily to be employed to look into and conduct these tedious examinations in connection with the judges and clerks before whom they were made and reduced to writing, would carry the figures to an aggregate so absolutely *enormous* as of itself to denote the *hardship* of the rule suggested by the committee; and when to this consideration there will be added from the testimony that the official partisans of the contestee, whose so-called elections were in the same process of contest with his own, would not permit me to *obtain* "the best testimony" in cases where the ballots had to be resorted to, surely the record I have made before you, and which assails and vitiates the registration of the district *as a whole*, may be regarded as at least sufficient to "*vacate* the election" which was held under it.

Turning to that branch of the testimony, it will be seen by the depositions of Livingston, Essig, and Funkhouser, on pages 6, 10, 13, and 14, that on the 5th of February last (which was as soon under the return law of my State and your notice law as I could) I made formal application to the court of my county to make an order which would enable me to have a recount of the ballots which were cast respectively for the contestee and myself, and that my application was officially overruled, in conformity with the construction (no matter how absurd or simulated) which the presiding justice announced as to the law of the State, in contravention of the design of the law of Congress.

The testimony will further show that I thereupon publicly requested either of the judges then upon the bench to consent to take my depositions for me, and to issue the necessary *subpœna duces tecum* to their clerk (under the Federal law) to produce the ballot-boxes, registry lists, and poll-books, from which to be able to fix and depose to the number of rejected voters, as well as the number of accepted voters, which had been cast for the contestee and myself in my own township, where there had been no certificate attached to the poll-books as to whom the rejected votes had been given, and where I had reason to believe that I had been most *grossly* swindled in the cast or count of the accepted vote; and that this, too, was unanimously refused me by a bench who claimed to have been elected on the same ticket, and consequently to hold and exercise their offices by the same tenure with the contestee.

As nearly all the counties in the district were officered *de facto* as my own was, and as the judge of the circuit was understood to be absent at the capitol, whereby even the uncer-

tain remedy of *mandamus* could not be made available to me in time to have my case properly prepared and presented within the limit enacted by your law, I had necessarily to *yield* to official misrulings and discourtesies which I could not control, and to *compromise* (so to speak) for such testimony as I could *get*, and *as* I could get it. I had given notice to take these depositions before one of those county judges, at the county clerk's office, but the judge refused to serve me, and the clerk refused my attorney even the use of his office. The taking had hence to be properly adjourned to another place, before two justices of the peace, before whom this clerk (who was also elected on the contestee's ticket) was summoned as a witness; and who, in answer to the question, "Why did you not count the ballots of Concord township?" replied:

"Simply because there was no official order made by the county court for me to do so, without which I had no authority to do so under the law."

It will be seen by the report of the committee (page 5) that although this clerk swears he "was personally acquainted with nearly all the registered voters on the rejected list of that township, and with their politics, and that his opinion and belief was that they all voted for me," they were nevertheless not included in the number set down to me in the report as my rejected aggregate in that county. So also of two other townships in La Fayette county, (and it may be added of one of the largest voting districts in Platte county,) which demonstrates that the committee was at least to that extent mistaken in assuming that the "rejected lists of the registers, and the rejected votes, furnished the names of the candidates for whom they voted." Whatever may be thought, therefore, of the rule they have suggested as to "names," when applied to a contestant's claim *himself to fill* the seat of a sitting member, it is deferentially submitted that it would be neither judicious nor equitable to apply it to the *vacation* of a seat where (as is relied upon in this case) there is other and quite sufficient testimony to satisfy the House that it *should* be vacated; and this, notwithstanding the mistaken assumption to which you have just listened, that as "the name of every person on the rejected list who offered to vote is preserved, and the ballot he attempted to cast is marked with his *number*, it was perfectly *easy*" for me to show the names of all my rejected voters by *record* evidence.

The distinction in the two cases is so apparent to my own understanding—it was indeed so reluctantly *forced* upon my understanding when the ordinary facilities of the law were denied to me at the first practical commencement of this controversy—that I may be pardoned the reiteration, (if such it be,) that in thus again referring to this portion of the report of the committee, it is designed simply to demonstrate that, however proper its judgment may have been in declining to count votes in my *favor* which I was denied the right of identifying by the ballots—and could hence only do so upon testimony of a "class" or character less certain or exact—it would seem impermissibly inequitable and unforecasting to refuse to consider even *such* testimony (much less the "array" of more specific testimony I have here presented) as a basis upon which to at least *vacate* this election.

As a practical condensation of this point it may be stated thus: in my notice to the contestant, my first and fourth charges, upon which it will be seen he took issue with me in his answer, are stated thus:

"1. I charge that I received a majority of the votes that were legally cast for a Representative in Congress at the said election, and that they should have been counted for me in the returns from the various townships and counties of the district instead of being rejected (as they were) and omitted from my count by the election judges and other returning officers. Of the legal ballots thus cast for me, but which were not counted in my favor, about one hundred and seventy were so cast by legal voters in the county of Clinton; about one hundred in the county of Caldwell; about two hundred in the county of Ray; about the same number in the county of Carroll; probably about one hundred in the county of Chariton; about five hundred in the county of Saline, and probably about an equal number in the counties, respectively, of La Fayette, Jackson, Platte, and Clay; and the votes thus cast for me, but rejected and not counted in my favor, were so cast by loyal citizens, who had duly complied with the test-oath provision of the new constitution, but were denied the right of registration as qualified voters, their names registered as rejected voters, and their ballots placed in the boxes of rejected voters accordingly. I shall hence demand such a comparison or inspection of the ballots thus cast for me as may be sufficient to verify the allegation thus made that you were not, and that I was, elected to Congress from this district."

"4. I charge that in many townships and counties you were certified to have received more votes than were really cast for you, while a less number than those cast for me were counted and certified in my favor; that in some counties the poll-books of entire townships which had given me majorities were illegally excluded in the count and certificates of the county clerks, who were your partisans; while in others the poll-books of entire townships which had given you majorities, but which were legally invalid, were included in the count and certificates of clerks alike partisan and unjust; and I shall consequently insist upon a recount of all the ballots cast at said election."

This notice was duly served upon the sitting member on the 10th day of January, 1867. On the 5th of February following, which was the first day afterward that a court was held at which I could "demand such a comparison or inspection of the ballots" as I had notified him I would demand, I did so demand it, and it was refused to me by a court, the judges of whom claimed to have been elected on the same ticket with the sitting member. If it would at all strengthen the argument on this point, it might be additionally stated that the partisan county attorney, who subsequently appeared as the contestee's counsel in the taking of these depositions, was even *officiously* prominent in pointing out the law upon which this gross misruling was predicated; but it will suffice to state that as this was the ruling of a court in the preliminary or foundation stage of our suit or controversy, he at least accepted that ruling, so far as it forced upon me the class of testimony to which I was thenceforward compelled to resort at his own peril; and that it would be to reverse every principle of either law or justice to permit him thus and here to "take advantage" of his own mis-

judgment or "of his own wrong." If this be not so, or if, in other words, what I can but regard as a more rigid ruling of the committee than it would make upon still further reflection upon the record, is nevertheless indorsed as the judgment of the House, I can but naturally suppose it to carry with it a virtual decision of all future election contests in favor of the party who (for the time being) may have the ear of the county tribunals, who hold the key to the county records!

The House will of course bear with me in the attempt to render this illustration still more practically apposite and persuasive as to its duty in this case. As it was shown by the returns which were canvassed and sent to the secretary of State that the contestee had a majority against me of 534, I would of course have had to prove, under the committee's ruling, in order to entitle *myself* to the seat in controversy, that at least 535 votes which were *not* counted and returned for me *ought to have been* so counted and so returned. Well, sir, it is shown by the testimony that I essayed my utmost *to do* this, and I feel that I hazard nothing in saying I would *have done* so but for the misrulings of the court, which were practically *final* as to the "class" of testimony to which I was *driven* in further carrying on this contest. To the number of 133 "rejected" votes, and as I had reason to believe to a much larger number of "accepted" votes, the records of the election were *absolutely* sealed against me; and when to this it is added, that from this illegal and doubtless preconcerted refusal of the official supporters of the contestee, to permit me to exemplify or prove from the ballots of the townships where these rejected votes were divided between him and myself the "names" of those who voted for *me*, as contradistinguished from the name or names of those who voted for *him*, is it not too plain for argument that the contestee *himself* is responsible for "the *class* of evidence" to which I was most reluctantly *driven* in the preparation, presentation, and final submission of this case?

Will you, nevertheless, permit him to object against me *now*, that his judges and clerks refused me justice *then*? or will you not the rather concede to me, that as I had no reason to anticipate that the judicial misrulings and other official impediments which had been cast in my way thus early in my own county would be in any sense modified to my advantage in a majority of the remaining counties, I should be at least *excused* for having so compromised my way, through judges and clerks who were "dead against me," as to make sure of what I had reason to suppose would be testimony enough "to at least *vacate* the election?"

THE MOST APPOSITE PRECEDENT IN THE CASE.

I knew, Mr. Speaker, what I may allude to without even an *implication* of political or official disparagement, that my mere political status was not such as to commend me to consideration beyond "the testimony and the law," but I recurred to what I was once a party to before the same committee, and to what I shall here recall and copy from their ruling in the three Missouri cases which were presented for their consideration four years ago, and which, in their report upon the case of Bruce *vs.* Loan, is set out in these equitable, direct, and unambiguous words:

> "The contestee, on the hearing, took exceptions to some of the allegations contained in the contestant's notice as indefinite, and referred to failures on the part of the contestant to comply with some of the provisions of the act passed in 1851 relative to taking testimony in contested-election cases.
>
> "The majority of the committee, from the view they entertain of this case, deem it unnecessary to discuss in their report the questions presented by the contestee's exceptions, as they are entirely satisfied, from the testimony produced, where both parties appeared and the witnesses were subjected to a rigid cross-examination by the contestee, that the election was not conducted so as to entitle either candidate to a seat in this House."

I remembered this perfectly, Mr. Speaker. It may be respectfully repeated that I remembered it analogously, discriminatingly, and personally; and that although in that case, and in the analogous ones, to one of which I was myself the party contestant, the minority of the committee took a somewhat different view both as to the "class" and the sufficiency of the testimony, there was neither of us who regarded the loss of our cases by the subsequent non-concurrence of the House as having resulted from the character or the "*class*" of our testimony. In my own case I had testimony from but four counties out of ten, and even that was rebutted and "explained away" by many well-considered depositions on the part of the contestee; whereas in the present case I have the same "class of evidence" (as to the extent of the disfranchisements which were complained of alike in each case) from eight of the ten counties of the same district, and without even so much as a line to break the force of so exuberant an abundance. If, therefore, I have succeeded in satisfying the dignity of the House that I did not disregard what I had reason to regard as its most apposite precedents, but rather *clung to them* in the extremity to which I deemed myself reduced by the misrulings and other wrongs of the official partisans of the *contestee*, and have also satisfied its conscientious judgment that I have at least proven enough "vacate" this election, I shall but naturally expect that the resolution which declares the contestee entitled to represent our district will be superseded by one which shall reprobate the registration and election as having been alike illegal and unfair, and as a consequence *vacate* the seat in controversy.

THE NEW CONSTITUTION NEVER JUDICIALLY RECOGNIZED IN MISSOURI.

A few words more, Mr. Speaker, and from the technical question of "evidence," which we have been so long considering, we will pass to the broader and less technical guarantees of the Federal Constitution—to the "bill of rights for the people of each State," as a former Chief Justice of the United States denominated those guarantees, and which I hope to demonstrate are all-embracing as to the more enlarged *constitutional* aspect of this case. In a subordinately conservative view of the question it might perhaps be best were it as true in fact

as it doubtless appeared to the official understanding of the committee, that "by every department of the State government of Missouri" its new "constitution is regarded and acted upon as the fundamental law of the State." As, however, of the official bulletin once announcing to the nations, in the face of sorrowing history, that "order reigned in Warsaw," so, too, of whatever *has been* of recognition for this new constitution, by the people of a State so fair and fertile as to continue to prosper even under the *worst* misgovernment—it has been but "the order of the despot and the slave." That constitution, sir, was *never* so "recognized and acted upon" by the judicial department of our State government so long as we had a constitutional judiciary; but it was, on the contrary, the crowning blemish of the dishonoring official history of that instrument, that our supreme judges, who had been elected by the same constituency which had limited the convention *not* to do what they *did* do, were dragged from the bench to the calaboose in obeisance to the usurping sword of a partisan executive, and that the same sword thrust into their places, in defiance alike of protest and of law, a *new* bench of so-called judges, through whom alone it came to pass that such a constitution was even "seemingly" recognized by the State judiciary, and that only to be thrown back upon them by the supreme *Federal* judiciary. When to this it is added that perhaps nine tenths of the revenue of the State is paid by citizens who realize that the Government which collects it exists alone in "fraud, and force, and acquiescence," and that there is reserved to the House I am addressing, "in the reception of Representatives from that State," the "right to judge of the qualifications and *returns*" of those Representatives, there will have been laid at least a sufficient premise for the paragraphs which it is but fair to next quote from the report of the committee, as follows:

"The contestant now claims that this State constitution, so far at least as it affects elections of members of Congress, should be held a nullity, and as if it had never been adopted by the people of the State.

"This is claimed upon the ground that the convention by whom it was framed exceeded their powers given by the legislative act by which the convention was called, and that this was not cured by its subsequent adoption by the people, because, in submitting it to a vote of the people, those only were allowed to vote who could take the oath prescribed in the second article of the constitution, the effect of which was to preclude large numbers from voting who had been previously allowed to vote. The committee have not deemed themselves at liberty to enter upon this inquiry.

"It being conceded that by every department of the State government of Missouri this constitution is recognized and acted upon as the fundamental law of the State, and by Congress in the reception of representatives from the State, it is in our judgment too late for this House to inquire as to the regularity of its formation or adoption by the State."

To what extent these positions have been anticipated and theoretically replied to, in the previous argument as to the proper *construction* of the clause of the constitution here in controversy, remains, of course, to be denoted in the final judgment of the House; and I hence here conclude or close that branch of the argument to which you have so indulgently listened.

THE QUESTION OF CONSTITUTIONAL POWER TO IMPOSE THE OATH IN CONTROVERSY.

Coming, lastly, to that portion of the report of the committee which has relation to the decision of the Supreme Court, in disaffirmance of the *power* of a State to enact such a "test" as the one I here complain of, because of the explicit prohibitions contained in the Constitution of the United States, and the reasoning of which is deemed to be quite as applicable to the disfranchisement of voters as to the disqualification of priests or preachers, I read from the committee's report at pages 4 and 5, as follows:

"The contestant claims that the same application of principles requires the same decision in relation to voters; that the virtual disfranchisement of persons who were voters under the previous constitution and laws of the State, but who are prevented from voting under the new constitution by reason of their inability to take the oath it requires, can only be regarded as a punishment for the act, which stands in the way of taking the oath, and that the Constitution of the United States prohibits the infliction of punishment by subsequent legislation.

"If such disfranchisement must be regarded as established for the purpose of punishing the persons thus deprived of the right of voting it must be admitted to come entirely within the reasoning by which the above cited judgment of the court is supported."

Respectfully requesting that the concession thus recited from the report be kept continually uppermost in the eye of the House, I read on as follows:

"Your committee believe that the provisions of the new constitution of Missouri may be supported, so far as they require this oath of voters, without at all trenching upon the decision of the Supreme Court.

"Each of the States of the Union have hitherto regulated suffrage within their own limits for themselves, and in such manner as the people of the State deemed most conducive to their own interests and welfare. Suffrage is a political right or privilege which every free community grants to such number and class of persons as it deems fittest to represent and advance the wants and interests of the whole. No State grants it to all persons, but with such limitations as the interests of all and the interest of the State require.

"When once granted it is not a vested, irrevocable right, but is held at the pleasure of the power that gave it, and the State may, by a change of its fundamental law, restrict as well as enlarge it. When, therefore, the State of Missouri, in changing its constitution, saw fit to declare that the interests of the State and of the people of the State would be promoted by withholding the right of voting from all persons who could not take the prescribed oath, they exercised no greater or higher power than exists in every State.

"The committee do not feel justified in entering into any enlarged discussion of this point of constitutional law, and therefore merely state the facts and their conclusions thereon."

Of so much of the foregoing theory as but correctly assumes that "suffrage," "when once *granted*," "is *held at the pleasure of* THE POWER THAT GAVE IT," it need, of course, be not further alluded to than as the indirect concurrence by the committee in the impregnability of the proposition whereon I based the argument, awhile ago, that the *unratified* disfranchisements here in controversy had, *in fact*, no other sanctions than those of "*fraud* and FORCE." As, however, "the committee have not deemed themselves at liberty to enter

upon" this proposition in the practical sense in which I have had the honor to present it, I shall make no further allusion to the proposition upon which they dismiss it than to respectfully inquire, in the language of the patriot poet,

"What *constitutes* a State?"

and denying, as he would have done, that the infamy by which alone I have been constrained to appeal to you as a contestant, instead of having been certified to you as a peer, was ever legitimately enacted by the

"High minded *men*" * * * who "*constitute* the State,"

pass next to the issue upon which the committee *have* entered, and which they have decided against me. As they but fairly and frankly admit that "if such disfranchisements must be regarded as established for the purpose of *punishing* the persons thus deprived of the right of voting," "they come entirely within the reasoning" of the court in the priests case; and as perhaps no one will deny that a case "entirely within the *reasoning*" of an adjudicated case must ultimately be similarly *adjudicated*, there would seem to be devolved upon me the duty alone of so combining and reciting the opinion of the court as to demonstrate that it *did* regard such disfranchisements as I here complain of as "punishment"—and that, being for that reason within the inhibitions upon the sovereignty of the States, to which they each and all assented by coming into the Union, the case may be substantially regarded as *res adjudicati*.

As substantially the same points which are made by the committee in this case seem to have been made by the counsel for Missouri in that case, the answer to them may be read from the opinion in question, as follows:

"We admit the propositions of the counsel of Missouri, that the States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; that they still retain those attributes, except as they have been surrendered by the formation of the Constitution and the amendments thereto; that the new States upon their admission into the Union became invested with equal rights, and were thereafter subject only to similar restrictions, and that among the rights reserved to the States is the right of each State to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.

"These are general propositions and involve principles of the highest moment. But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is *not* as to the existence of the power of the State, over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution."

A little further on the court continues its reasoning as follows:

"The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, and property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions; though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

And yet a little further on they continue to reason as follows:

"In France, deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code. The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights, and, the disabilities prescribed by the provisions of the Missouri constitution being in effect *punishment*, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement."

Can it be possible, Mr. Speaker, that the preachers case and the voters case were dissociated in the mind of the court when rendering this long-matured opinion, or that they forebore on that occasion to redress the wrongs I here complain of by their *judgment*, as well as their "reasoning," except for the judicial reason that the voter was not (in legal parlance) a party to the *record* there, whereas he is the *only* party to it here? Perhaps I ought to add, that although the oath was the same in the voters case as in that of the priest and other parties enumerated in the general reasoning of the court, he was excluded from the franchise under a different section of the Constitution from the one under which the priest was forbidden to follow his previous calling—and this, to the professional listener, will constitute a sufficiently satisfactory explanation why the voters, who were disfranchised under the third section of the Constitution, were not more specifically alluded to in the reasoning of the court upon the ninth section.

Must they not have been, however, indissolubly associated in the mind of the court, when speaking of the "deprivation of the right of voting" in France as a "punishment prescribed by her code, just as it will doubtless be shown, in the voting case now before the court from Missouri, that it is punishable by the laws of that State? and when *correcting* the counsel for Missouri for not having used the terms life, liberty, and property, as comprehending "every right known to the law," including "freedom from outrage on the *feelings* as well as restraints on the person?" and when concluding one of the quotations I have made from their reasoning, with words which will constitute in all the future a fundamental maxim of our jurisprudence, to wit, that "the deprivation of *any* rights, civil or political, *previously enjoyed*, may [as in this case] be *punishment*." Expecting to demon-

strate presently that, in a case analogous, the highest historical authority is in but natural accord with the highest judicial authority, not only that the deprivation of the political rights in contest here "*may* be" punishment, but that they *are* punishments of the most "degrading" character, when enacted by a "retrospective penal law," we will next draw upon the opinion of the court as to the scope and severity of this oath, as follows:

"The oath thus required is for its severity without any precedent that we can discover. In the first place it is retrospective; it embraces all the past from this day; and if taken years hence it will also cover all the intervening period. In its retrospective feature we believe it is peculiar to this country. In England and France there have been test-oaths, but they were always limited to an affirmation of present belief or present disposition toward the Government, and were never exacted with reference to particular instances of past misconduct. In the second place, the oath is directed not merely against overt and visible acts of hostility to the Government, but it is intended to reach words, desires, and sympathies also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity or affection or relationship."

It is trusted no member of the House will fail to recall in this connection the practical construction or administration of this oath by the registerial partisans of the contestee, who rejected twenty-eight hundred and thirty-five of my supporters who had taken it in the sense, doubtless, that they had not *disloyally* sympathized with the southern people, and who were rejected in the probable proportion of eleven twelfths of the whole simply because their names were copied and certified from the *military* list of "sympathizers" to which so many were driven or forced in 1862. But I am possibly bordering on a digression from the issue now under discussion, and will hence return to the opinion of the court for the reasons upon which they decided that the requirements of the Missouri constitution were, in this regard, inhibited by the Constitution of the United States. The court says:

"The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amid which the convention held its deliberations."

"It was against the excited action of the States under such influences as these that the framers of the Federal Constitution intended to guard. In Fletcher *vs.* Peck, (6 Cranch, 137,) Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the State sovereignties it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment: and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.'

"'No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.'"

It was to this prohibition—this "bill of rights for the people of each State"—that the remainder of the reasoning of the court was directed; and I know not how better to conclude the extracts to which my time and strength alike restrict me, than by reading from the *examples* they have hypothesized in their argument, a prescient and all-embracing illustration of the propriety and *sanctity* of these constitutional inhibitions, as follows:

"Take still another case: suppose that in the progress of events persons now in the minority in the State should obtain the ascendency and secure the control of the government; nothing could prevent, if this constitutional prohibition can be evaded, the enactment of a provision requiring every person, as a condition of holding any position of honor or trust or of pursuing any avocation in the State, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals and even whole classes may be deprived of political and civil rights."

Deeming it unnecessary to read the concurrent deprecatory reasoning of Judge Holmes, who recently delivered the opinion of the *de facto* court in Missouri, in an analogous case at St. Louis, but nevertheless congratulating the House and the country upon the ultimate *acquiescence* thus significantly foreshadowed, the considerations I have deferentially submitted for at least "vacating" the seat in controversy will be concluded by the historical reference to which allusion has been made, and which I but substantially reproduce from the argument of a professional friend in the Blair case at St. Louis, now pending before the Supreme Court here, as follows:

During the reign of Charles II proceedings were set on foot to forfeit the charters of most of the principal cities and towns of England. The privileges and immunities enjoyed by those who were freemen of a city or borough were a great obstacle to the designs entertained at that period by the court party. It was felt that an immense advantage would be gained if the charters of the municipalities could be forfeited. With a view to this the Crown, by virtue of the power then held by it of displacing any judge at pleasure and appointing his successor, purged the bench of every judge who from his learning and integrity was supposed not to be likely to prove a tool of arbitrary power; and then writs of *quo warranto* were issued against the several corporations. But in England, in the worst of times, there has been some reverence for law, and some hesitation to commit open outrages upon it. So soon as the actions were begun the creatures of the Crown began to approach the municipal magistrates, and advise them to surrender their charters without a trial to the Crown, trusting to the clemency of the king to grant them new charters, not so favorable, indeed, as the old, but far better than could be looked for if formal judgment of ouster were passed against them. This was the form of the solicitation. Both the monarch and his

supple instruments, the judges, had a wholesome dread of the possible consequences that might ensue to them both in case of a popular reaction such as had led to the Long Parliament, and they had no such disposition to push matters to extremities if it was possible to avoid that necessity by a compromise. Most of the corporations were persuaded to surrender their charters for fear of encountering still worse evils. Of course there were on this subject in each borough two parties; one of them in favor of surrendering the charters (these were mostly friends of the prerogative, or Tories,) and the other opposed to this policy, mainly composed of Whigs. These things were done between 1683 and 1686.

In 1688 occurred the revolution that drove the Stuart dynasty from the throne of Great Britain. The first Parliament which assembled under the new monarch betook itself to the task of redressing some of the more heinous wrongs of the preceding reigns. In this Parliament the Whigs had a majority. In an evil hour some of that party bethought themselves of a scheme, the accomplishment of which would, they thought, secure to the Whigs a permanent tenure of political power. They resolved to seize the occasion of the corporation bill for effecting this object. The narrative of the heated party strife of the seventeenth century, with the comment of the historian alluded to, may be read in the third volume of Macaulay's History of England, at pages 398–401, as follows:

"A bill for restoring the rights of those corporations which, during the reign of Charles II and James II, had surrendered their charter to the Crown, had been brought into the House of Commons, read twice, and referred to a committee of which Somers was chairman. He reported the bill to the House on January 2d, 1690. Most of the Tory members were then absent, keeping Christmas at their homes. The Whigs, being in the secret, were present in great numbers. The moment the bill was read, Sacheverell, who had been an energetic exclusionist in the time of Charles II, moved a clause that every municipal functionary who had in any manner been a party to surrendering the charter of any borough to the Crown, should be for seven years incapable of holding any office in that borough. The charter of nearly every corporate town in England had been remodeled during the 'hot fit of loyalty' which followed the detection of the Rye House plot, and in almost every borough the voice of the Tories had been for surrendering the charter and trusting to the paternal care of the king." "The effect of Sacheverell's clause was thus to make some thousands of the most opulent and highly-considered men of the kingdom incapable, for seven years, of bearing any part in the government of the places where they resided, and to secure to the Whig party for seven years an overwhelming influence in borough elections.

"The minority exclaimed against the gross injustice of passing rapidly and by surprise, at a season when London was empty, a law which retrospectively inflicted a severe penalty on many hundred respectable gentlemen; a law which would call forth the strongest passions in every town from Berwick to St. Ives; a law which must have a serious effect on the composition of the House itself. Common decency required at least an adjournment. An adjournment was moved, but the motion was rejected by 127 to 89. The question was then put that Sacheverell's clause should stand as part of the bill, and was carried by 133 to 68. Sir Robert Howard immediately moved that every person who, being under Sacheverell's clause disqualified for municipal office, should presume to take any such office should forfeit £500 and be for life incapable of holding any public employment whatever. The Tories did not venture to divide." * * * * "It was immediately resolved that the bill, enlarged by Sacheverell's and Howard's clauses, should be engrossed. The most vehement Whigs were bent on finally passing it within forty-eight hours. The Lords, indeed, were not likely to regard it very favorably. But it would seem there were some desperate men prepared to withhold the supplies and thus to place the Upper House under the necessity of either consenting to a vast proscription of the Tories or refusing to the Government the means of carrying on the war. There were Whigs, however, honest enough to wish that fair play should be given to the hostile party, and prudent enough to know that an advantage obtained by violence and cunning could not be permanent. These men insisted that at least a week should be suffered to elapse before the third reading, and carried their point. Their less scrupulous associates complained bitterly that the good cause was betrayed." * * * * * "As a postponement of a few days appeared, however, to be inevitable, those who had intended to gain the day by stealing a march now disclaimed that intention." * * * * "The mails had carried out along all the high roads the tidings that on the 2d of January the Commons had agreed to a retrospective penal law against the whole Tory party, and that on the tenth that law would be considered for the last time. The whole kingdom was moved from Northumberland to Cornwall." * * * * "Assuredly, no reasonable man of any party will deny that the Tories, in surrendering to the Crown all the municipal franchises of the realm, and with these franchises the power of altering the constitution of the House of Commons, committed a great fault. But in that fault the nation itself had been an accomplice. If the mayors and aldermen whom it was now proposed to punish had, when the tide of loyal enthusiasm ran high, sturdily refused to comply with the wish of their sovereign, they would have been pointed out in the street as Roundhead knaves, preached at by rector, lampooned in ballads, and probably burned in effigy before their own doors. That a community should be hurried into errors, alternately by fear of tyranny and by fear of anarchy, is doubtless a great evil; but the remedy for that evil is not to punish for such errors some persons who have merely erred with the rest and who have since repented with the rest. Nor ought it to be forgotten that the offenders against whom Sacheverell's clause was directed had in 1688 made large atonement for the misconduct of which they had been guilty in 1683. They had as a class stood up firmly against the dispensing power, and most of them had actually been turned out of their municipal offices by James for refusing to support his policy. It is not strange, therefore, that the attempt to inflict on all these men, without exception, a degrading *punishment*, should have raised such a storm of public indignation as many Whig members of Parliament were unable to face."

Need more be added, Mr. Speaker, whether in indignant reprehension of the past, or respectful premonition of the future? The historian of England—the Whig who quitted her Parliament to write her history—has written of the measure *proposed* by his party, but not finally carried, what the court of last resort has substantially written of the *enactment* here in controversy—that it "retrospectively inflicts a severe penalty," that it was (or would have been) "a retrospective penal law," and that it was an attempt "to inflict upon" a certain class of people, without exception, (there as here,) "a degrading *punishment*."

Recurring hence to the concession of the committee, that "if such disfranchisements must be regarded as punishment," this case is but *necessarily* within the reasoning of the court in the opinion so often quoted from, *may I not respectfully demand your "judgment" accordingly?* Not only upon the concurrence of the highest judicial and historic authority, whereby it has been shown that these *ex post facto* disfranchisements *are to be* regarded as

"punishments," but upon that other and like fundamental concession of the committee, that "suffrage" "once granted" "is held at the pleasure of *the power that gave it*," is that "judgment" deferentially anticipated in the decision you are now soon to render. And what has the contestee opposed to all this, or what *can* he oppose why your judgment should *not* be thus rendered? Is it too much to suggest that it will be simply such sinuous and sinister prejudices and such implacable resentments as have been fostered and fulminated against the "thousands" who once *mistook* their true loyalty, as every member of the Legislature did, and the most *earnest* of whom, in the language of Macaulay, having "merely erred with the rest and since repented with the rest," should but equitably and naturally be *forgiven* with the rest. Concerning such citizens I have here a deposition from one of the counties which may safely enough be relied upon as denoting at least *the present and future* loyalty of those who either "could not or would not take the retrospective part" of this unconstitutional "test-oath," and with the reading of the most pertinent portions of which I shall be prepared to submit to the decision of the House the case of a long wronged and an outraged constituency. At pages 42 and 43 Robert P. C. Wilson swears as follows:

"I am a lawyer by profession and have resided in Platte county, Missouri, for a number of years, in fact was partially raised here; am well acquainted with the people of the county generally, and was so acquainted at the general election of 1866; was registered at said election as a qualified voter. Believing that a portion of what was called the Missouri test-oath, and which oath was administered to voters at the general election indicated, was unconstitutional, I advised the people of the fact that at Platte City I would receive and preserve the ballots of all persons otherwise qualified, but who could or would not take the retrospective part of said oath and would take the prospective portion of the same. On the election day, the 6th of November, 1866, I was present at the polls and did receive and preserve the ballots of about one hundred—I think it was exactly one hundred ballots—of the kind indicated above. Before receiving a ballot of any person—in fact, all the persons who deposited their ballots with me at the Platte City polls went before a justice of the peace of the county and took and subscribed the prospective part of said test-oath, stamping and canceling the stamp on same; then, with the oath annexed to their tickets, presented themselves to the judges of election and demanded the privilege of voting, which privilege was uniformly denied them. The ballots of all such were preserved by me, and I believe without exception were in favor of Judge Birch for Congress. I think all these persons were residents of the election district in which they offered to vote, and had it not been for the enforcement of the *ex post facto* part of said oath I believe they each and all would have been entitled to vote and would have been duly registered," &c. * * * * "The votes, or rather the one hundred ballots preserved by me and mentioned above, were not included in any official count made."

They have hence been included in no numerical aggregate, either of the committee or myself, but are you prepared to decide against the oath of these men, and the *prospective* allegiance they pledge to the Government, that they, too, are not "loyal citizens," *for whom* it was the duty of the convention, under the limitation of the organic act of their existence, and in view of the inhibitions of the Federal Constitution as to *any other oath than the one they took*, to "preserve in purity the elective franchise?" And what message shall I send or carry to this class of men, the conduct of many of whom, to again repeat the language of the court, was "not even blameworthy," and who, upon the correlatives of "allegiance and protection," so ably enforced during the morning by the gentleman from Indiana, [Mr. ORTH,] are but *naturally* entitled to "the protection of the ballot?" Shall I message them by telegram, to-night, that the legislative department of their Government peacefully and "loyally" acquiesces in the "reasoning" of the *judicial* department? or must it be that I shall have to carry to their firesides and their public assemblies the ungenial and unwelcome foreshadowing, that upon such a popular upheaving or revolution in this country as reduced the British Whigs to a *minority* in the Parliament which succeeded their but *menaced* disfranchisements, can they *alone* rely for *their* disenthrallment from an unconstitutional and "a degrading punishment?" Let it suffice to add, sir, if aught of human reason or of the most eminent authorities *can* suffice, that having brought to my aid the concurrences of history and of law upon the point wherein it is my misfortune to disagree with so respectable and respected a tribunal as the Committee of Elections, the decision between us must but naturally go to the House, and anon to the country from whom we all derive whatever of legitimate authority we may exercise here. To that House, which has so long and so patiently listened to me, as its committee had previously done, there remains to me, in conclusion, but the agreeable duty of committing the case of my constituents to their joint and final decision; and of returning to its members, and to you, Mr. Speaker, my most appreciative acknowledgments, and my most sincere and respectful thanks.

NOTE BY Mr. B., JANUARY 10.—I regret to find that there will not be room for the extracts I had brought together from the remarks of Mr. KERR, of Indiana, in respect to the "great, if not insurmountable," impediments which were thrown in the way of obtaining such testimony as the committee refer to; and that I am limited to the closing sentence of the speech of that gentleman, as follows:

"I agree with the learned gentleman from Pennsylvania, [Mr. WOODWARD,] for whose judgment I entertain profound respect, that that exercise of power on the part of that constitutional convention was utterly unauthorized, was illegal, was unconstitutional. In my judgment it was most infamous, and in reference to the institutions of that State it was revolutionary. It was a dishonor which throws shame upon the State of Missouri to this day, and will continue to do so until that infamous provision in that constitution is expunged, as it will be, as certain as God rules, in the early future of this country."

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